Philomene Thea (Guinea National) v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–264–09 OF 2011

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ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA

27 JUNE 2013

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Drug offence — Accused sentenced to death — Accused carried drugs in baggage while travelling from Bangkok to Kuala Lumpur — Whether defence was afterthought — Whether accused had exclusive custody and control of bag — Whether trial judge misdirected herself — Whether irrelevant and prejudicial facts taken into account in finding accused guilty for trafficking — Dangerous Drugs Act 1952 s 39B(2)

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The appellant, a Republic De Guinea national, was seen by a customs officer ('SP2'), pulling a trolley bag at the arrival hall of the KLIA. When the bag was scanned, suspicious images showed up on the scanner. The appellant was then asked to take her bag to the counter/place for the examination of baggage. The appellant placed the bag for examination and took a key from a purse that was in a sling bag. The key was for the padlock that was attached to the zip of the bag. After the appellant removed all the clothing from the bag, SP3 found a plastic wrapped with a brown cellotape hidden at the bottom of the bag. The packets found in the bag ('exh P9') were later sent to the chemist for chemical analysis and was confirmed to be 1,743g of methamphetamine. At the end of the prosecution case, the learned trial judge found that a prima facie case against the appellant had been proven and the appellant was called to enter her defence. The appellant did not dispute that she carried exh P9 from Bamaco to Addis Ababa and then to Malaysia via Bangkok. However, the appellant argued that from Bamaco, she only had a hand bag and exh P9, which she had checked-in was packed by her friend. According to the appellant, the purpose of her trip to Malaysia was to buy gold. The appellant further argued that exh P9 was not locked and therefore, someone could have placed the drugs in the bag. The trial judge found that the defence of the appellant was an afterthought and subsequently convicted the appellant of the charge and sentenced her to death. Dissatisfied with the decision of the trial judge, the appellant appealed against both the conviction and sentence. In the present appeal, the appellant contended that the trial judge erred in law and in fact in invoking s 37(d) of the Dangerous Drugs Act 1952 because the prosecution failed to prove that the appellant had exclusive custody and control of the bag; and the learned trial

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judge misdirected herself when she took into account irrelevant and prejudicial facts in finding the appellant was guilty for trafficking.

Held, dismissing the appeal:

(1) There was more than sufficient evidence to establish that the appellant had exercised exclusive control and custody of exh P9 at the time of her arrest. Exhibit P9 was checked-in in the name of the appellant. The baggage tag and the baggage claim tag confirmed the fact. The appellant was also seen by SP2 opening exh P9 by unlocking the padlock using a key taken from a purse which was inside a black sling bag carried by the appellant. There was no doubt that exh P9 was locked by the padlock and it was the appellant who unlocked the padlock (see paras 26 & 33).

(2) Although the trial judge may have taken into consideration the irrelevant evidence when deciding whether the appellant was guilty of trafficking, the trial judge had nevertheless addressed her mind on other relevant evidence, ie the drugs that were seized were found cleverly hidden at the bottom of exh P9; the appellant carried exh P9 all the way to Malaysia and the large quantity of drugs found in exh P9. Looking at the evidence as a whole, there was sufficient evidence led by the prosecution to show that the accused had trafficked in the dangerous drugs. The evidence of the luggage tag and the boarding pass clearly showed that the appellant had boarded the flight from Bangkok to Kuala Lumpur. This evidence, coupled with the other evidence that exh P9 was checked-in in the name of the appellant and the drugs were found concealed underneath exh P9, proved that the appellant was trafficking in the said dangerous drugs (see paras 39–40).

(3) The quantity of the methamphetamine transported by the appellant was much larger than was likely for her own consumption, and the manner it was concealed in the bottom of exh P9, an inference that the appellant transported them for the purpose of trafficking in the said drugs, would, in the absence of plausible explanation by her, be irresistible. In the instant case, the learned trial judge's decision that the element of trafficking had been proven was clearly correct (see paras 42 & 45).

[Bahasa Malaysia summary

Perayu, warganegara Republik De Guinea, dilihat oleh pegawai kastam ('SP2'), menarik beg troli di balai ketibaan KLIA. Apabila beg tersebut diimbas, imej-imej yang mencurigai dilihat dengan jelas di pengimbas tersebut. Perayu kemudiannya diminta untuk membawa begnya ke kaunter/tempat untuk pemeriksaan bagasi. Perayu meletakkan begnya untuk pemeriksaan dan mengambil kunci daripada dompet yang berada di dalam beg sandang. Kunci tersebut adalah untuk mangga yang terpasang di zip beg tersebut. Selepas perayu memindahkan kesemua pakaian daripada beg tersebut, SP3

menjumpai plastik yang dibungkus dengan 'cellotape' berwarna perang tersembunyi di bahagian bawah beg tersebut. Paket-paket dijumpai di dalam beg ('lampiran P9') kemudiannya dihantar kepada ahli kimia untuk analisis kimia dan disahkan dadah methamphetamine seberat 1,743g. Pada akhir kes pihak pendakwaan, hakim bicara yang bijaksana mendapati kes prima facie terhadap perayu telah dibuktikan dan perayu dipanggil untuk memasukkan pembelaan. Perayu tidak mempertikaikan yang dia membawa lampiran P9 dari Bamaco ke Addis Ababa dan kemudiannya ke Malaysia melalui Bangkok. Walau bagaimanapun, perayu berhujah bahawa dari Bamaco, dia hanya membawa beg tangan dan lampiran P9, yang mana telah di daftar masuk olehnya dikemaskan oleh kawannya. Mengikut perayu, tujuan perjalanannya ke Malaysia adalah untuk membeli emas. Perayu selanjutnya berhujah bahawa lampiran P9 tidak dikunci dan oleh itu, seseorang boleh meletakkan dadah di dalam beg tersebut. Hakim perbicaraan mendapati bahawa pembelaan perayu adalah satu yang difikirkan kemudiannya dan seterusnya menyabitkan perayu terhadap tuduhan dan menghukum dengan hukuman mati. Tidak berpuas hati dengan keputusan hakim bicara, perayu merayu terhadap kedua-dua sabitan dan hukuman. Dalam rayuan ini, perayu berhujah bahawa hakim bicara tersilap dari segi undang-undang dan fakta dalam membangkitkan s 37(d) Akta Dadah Berbahaya 1952 pihak pendakwaan gagal untuk membuktikan bahawa perayu mempunyai kawalan dan jagaan beg tersebut; dan hakim bicara yang bijaksana salah arah dirinya apabila beliau mengambil kira fakta yang tidak relevan dan memprejudis dalam mendapati bahawa perayu bersalah kerana mengedar.

Diputuskan, menolak rayuan:

(1) Terdapat keterangan yang lebih daripada mencukupi untuk membuktikan bahawa perayu mempunyai kawalan dan jagaan eksklusif lampiran P9 pada masa tangkapannya. Lampiran P9 didaftar masuk atas nama perayu. Tag bagasi dan tag tuntutan bagasi mengesahkan fakta ini. Perayu juga dilihat oleh SP2 membuka lampiran P9 dengan membuka mangga menggunakan kunci yang diambil daripada dompet yang mana adalah di dalam beg sandang yang dibawa oleh perayu. Tiada keraguan bahawa lampiran P9 dikunci oleh mangga dan perayulah yang membuka mangga tersebut (lihat perenggan 26 & 33).

(2) Walaupun hakim perbicaraan mungkin mengambil kira dalam pertimbangan keterangan yang tidak relevan apabila memutuskan sama ada perayu bersalah kerana mengedar, hakim perbicaraan walau bagaimanapun mengarahkan mindanya atas keterangan relevan yang lain, iaitu dadah yang dirampas dengan jelas dijumpai tersembunyi di bahagian bawah lampiran P9; perayu membawa lampiran P9 terus ke Malaysia dan sebahagian besar kuantiti dadah dijumpai di dalam P9. Mengambil kira keterangan secara keseluruhannya, terdapat keterangan yang mencukupi dikemukakan oleh pihak pendakwaan untuk

menunjukkan bahawa tertuduh telah mengedar dadah berbahaya. Keterangan tag beg dan pas naik jelas menunjukkan bahawa perayu telah menaiki kapal terbang dari Bangkok ke Kuala Lumpur. Keterangan ini, dikaitkan dengan keterangan lain yang lampiran P9 didaftar masuk atas nama perayu dan dadah dijumpai tersembunyi di bawah lampiran P9, membuktikan perayu mengedar dadah berbahaya tersebut (lihat perenggan 39–40).

(3) Kuantiti methamphetamine yang dibawa oleh perayu adalah lebih besar daripada untuk penggunaannya sendiri, dan cara ia disembunyikan di bahagian bawah lampiran P9, suatu inferens bahawa perayu yang mengangkutnya bagi tujuan mengedar dadah tersebut, akan, dalam ketiadaan penjelasan yang munasabah olehnya, tidak dapat ditahan. Dalam kes ini, keputusan hakim perbicaraan yang bijaksana bahawa unsur pengedaran telah dibuktikan adalah dengan jelas betul (lihat perenggan 42 & 45).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

Cases referred to

Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (refd)

Muhammed bin Hasan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)

Ong Ah Chuan v PP Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)

Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)

PP v Abdul Latif bin Sakimin [2005] 6 MLJ 351, HC (refd)

PP v Aedy Osman [2009] 1 LNS 13, HC (refd)

PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)

PP v Mohamed Ali [1962] 1 MLJ 257 (refd)

PP v Ouseng Sama-Ee [2008] 1 CLJ 337, CA (refd)

PP v Rosyatimah bt Neza & Anor [1989] 1 MLJ 360, HC (refd)

PP v Suzie Adrina bte Ahmad [2006] 5 MLJ 135; [2006] 3 CLJ 889, CA (refd)

PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685; [2005] 2 AMR 353, FC (refd)

PP v Teh Cheng Poh [1980] 1 MLJ 251 (refd)

PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)

Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)

Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 37(da), 39B(1)(a), 39B(2), First Schedule

Appeal from: Criminal Trial No 45A-79 of 2010 (High Court, Shah Alam)

Amy Law Siew Tin (St Law Shamini) for the appellant.
Siti Rafidah bt Zainuddin (Attorney General's Chambers) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

[1] The appellant, a Republic De Guinea national, was convicted by the High Court at Shah Alam, Selangor on the following charge:

> Bahawa kamu pada 19 Februari 2010, jam lebih kurang 9.05 malam, di Cawangan Pemeriksaan Penumpang 1, Balai Ketibaan Antarabangsa Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam Daerah Sepang, di dalam Negeri Selangor, telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 1743 gram, dan dengan itu, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The appellant was sentenced to death as mandated under s 39B(2) of the Dangerous Drug Act 1952 ('DDA 1952'). The appellant, being dissatisfied with the decision of the learned trial judge, has appealed to this court against both the conviction and sentence.

[3] We heard this appeal on 3 January 2013. Having heard submissions and examined the appeal record, we have dismissed the appeal. We affirmed the conviction and sentence passed by the High Court.

FACTS OF THE CASE

[4] The facts of the case are fully set out in the judgment of the learned trial judge. It is not necessary, for the purpose of this judgment, to repeat them in detail. It is suffice to summarise the salient's facts of the case.

THE PROSECUTION'S VERSION

[5] On the evening of 19 February 2010, Thai Airways International Flight TG 417 from Bangkok, Thailand, landed at the Kuala Lumpur International Airport ('KLIA'). The appellant was a passenger on this flight.

[6] At about 9.35pm, the appellant was seen by Azian bin Mamat, a customs officer ('SP2'), pulling a trolley bag towards the green lane at the arrival hall of the KLIA. SP2 directed the appellant to line up with the bag she was carrying (exh P9) so that her bag could be scanned. When the bag was scanned, SP2 was called by one Ikasukmayati bt Abdulah, who was on duty at the scanning

machine A, to examine the bag carried by the appellant. SP2's suspicious were raised when he saw the image of the bag on the scanner. The appellant was then asked to take her bag to the counter/place for the examination of baggage.

[7] The appellant placed the bag for examination and took a key from a purse that was in a black sling bag. The key was for the padlock that was attached to the zip of the bag. When the bag was opened, the appellant took out all the clothes that were in the bag but SP2 saw the bag still thick. The appellant was then asked to have the bag scanned again and SP2 saw a green image on the screen. SP2 then directed the appellant to put back all the clothes into the bag and was taken to the customs office. The appellant was handed over to Elangovan a/l Rethnesamy, a senior superintendent of customs ('SP3').

[8] At the customs office, the appellant was once again asked to open the bag. After the appellant removed all the clothing from the bag, SP3 found hidden at the bottom of the bag a plastic wrapped with a brown cellotape. In the plastic, SP3 found whitish crystalline substance. SP3 then conducted an initial drug test using a test kit. It was confirmed that the whitish crystalline substance was dangerous drug.

[9] The appellant was arrested and was later handed over together with the exhs seized to Afzarizzal bin Abdul Wahab, the investigation officer ('SP5').

[10] Both SP3 and SP5 marked the items seized from the appellant at the customs office.

[11] The packets found in the bag (exh P9) were later sent to Puan Maimonah bt Sulaiman, the chemist ('SP1') for chemical analysis. SP1 confirmed that the substance which weighing 1,743g, was methamphetamine, a dangerous drug listed under the First Schedule of the DDA 1952.

FINDINGS AT THE END OF THE PROSECUTION'S CASE

[12] The learned trial judge has found as a fact that the appellant was in custody and control of the said bag (exh P9). The appellant was seen pulling a trolley bag towards the green lane. The bag had a luggage tag number 277675 (exh P13) in the name of 'Thea Philomene', the appellant herein, checked-in from Addis Ababa via Bangkok to Kuala Lumpur. The baggage claim tag number 277675 (exh P20) to the said bag was found on the appellant. The baggage claim tag number tallies with the number on the baggage tag (exh P13). The e-ticket (exh P15) shows that the appellant travelled from Addis Ababa to Kuala Lumpur via Bangkok.

[13] Having so found, the learned trial judge then invoked s 37(d) of the DDA 1952 to presume knowledge on the part of the appellant.

[14] The learned trial judge found that there was sufficient evidence to show that the appellant had concealed, transported and carried the drugs from Bamaco to Addis Ababa and then to Malaysia (KLIA) via Bangkok. The amount of the drugs (1,743.6g) was much larger than was likely to be used for her own consumption. The learned trial judge held that the overt acts on the part of the appellant in concealing, transporting and carrying the drugs constituted 'trafficking' as defined in s 2 of the DDA 1952, independent of the presumption under s 37(da) of the Act.

[15] At the end of the prosecution's case, the learned trial judge found that all the ingredients required for a charge under s 39B(1)(a) of the DDA 1952 had been satisfied and the prosecution had proven a prima facie case against the appellant and thereupon called the appellant to enter her defence.

THE DEFENCE'S VERSION

[16] The appellant elected to give her evidence under oath in the witness box. She called no other witnesses in support of her defence. The appellant did not dispute that she carried exh P9 from Bamaco to Addis Ababa and then to Malaysia (KLIA) via Bangkok. The appellant testified that from Bamaco she only had a hand bag. The bag/suit case (exh P9) that she checked-in was packed by her friend. The appellant further stated that she was too sick to pack the bag as she was pregnant. She had travelled from Bomaco with a straw suit case that she claimed was dirty due to the journey from Bamaco to Addis Ababa and that was why her friend gave her the said bag.

[17] The purpose of her trip to Malaysia was to buy gold as she had found out during her first trip to Malaysia in December 2009 that the gold in Malaysia is better.

[18] The appellant alleged that the exh P9 was not locked. Therefore, someone could have placed the drugs in the bag.

FINDINGS AT THE END OF THE DEFENCE'S CASE

[19] It was the findings of the learned trial judge that the defence of the appellant was an afterthought. The story line about the appellant's friend and the bag was not put to any of the prosecution's witnesses. After subjecting the whole evidence adduced before the court to a maximum evaluation, the learned trial judge held that the appellant had failed to cast a reasonable doubt

on the prosecution's case.

THE APPEAL

[20] Before us, learned counsel for the appellant had advanced two grounds of appeal as follows:

(a) the learned trial judge erred in law and in fact in invoking s 37(d) of the DDA 1952 because the prosecution failed to prove that the appellant had exclusive custody and control of the bag; and

(b) the learned trial judge misdirected herself when she took into account irrelevant and prejudicial facts in finding the appellant was guilty for trafficking.

Ground (a)

[21] Learned counsel for the appellant submitted that there was no padlock and key to exh P9 as she did not use any padlock to lock the said bag. Exhibit P9 was checked-in in Addis Ababa on 18 February 2010 and was only reclaimed by the appellant in KLIA on 19 February 2010. The prosecution had failed to adduce any convincing evidence on this issue. Learned counsel invited the court's attention to the following facts:

(a) non of the exhibits tendered by the prosecution had shown any photographs showing the alleged padlock and key ('mangga dan kunci') (exhs P14A and P14B);

(b) SP3 agreed to the defence suggestion that there was no marking on P14A and P14B and this type of lock and key is similar to any keys that can be purchased from any shops;

(c) as confirmed by SP3 during cross-examination, *Borang Serah Menyerah Barang Kes* (exh P19) did not mention the existence of the exhs P14A and P14B; and

(d) SP3 also confirmed in cross-examination that he did not mark exhs P14A and P14B because at the same time he had another case or information to deal with. The situation at the material time was chaotic as there was another arrest at the same time of one Halimaton Diallo.

[22] Premised on the above facts, learned counsel submitted that the appellant had no exclusive custody or control of the bag and someone could have placed the drugs in the bag.

[23] Now, the working of the presumption under s 37(d) of the DDA 1952

was described by Siti Norma Yaakob FCJ (as she then was) in *Public Prosecutor v Tan Tatt Eek & Other appeals* [2005] 2 MLJ 685 at p 726; [2005] 2 AMR 353 at p 396 in the following fashion:

> In essence, the presumption under 37(d) works as follows:
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> > Once it is proved that a person has control and custody of a dangerous drug, he is deemed not only to be in possession of the drug but is also deemed to have knowledge of the nature of the drug until contrary is proved. As such without the evidence of custody and control, the rebuttable presumption of possession and knowledge cannot arise.

[24] It is pertinent to note that to attract the presumption under s 37(d) of the DDA 1952, it must be shown that custody or control must be exclusive. If, for instance, the premises or bag in which the drugs are found are accessible to others apart from the accused then the presumption cannot be applied (see *Public Prosecutor v Rosyatimah bt Neza & Anor* [1989] 1 MLJ 360 and *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137).

[25] In *Muhammed bin Hasan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170, the Federal Court had this say:

> [5a] The 'deemed' state of affairs in s 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs ie, the finding of custody or control. The word 'found' in the operating phrase of s 37(da), on the other hand, connotes a finding after a trial by the court.
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> [5b] Further, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s 37(d) of the Act and those required to raise 'presumed … trafficking' under s 37(da) are different. And thus, to come to the presumptions of possession and knowledge under s 37(d), one need only to arrive at a finding of having had 'in custody or under … control anything whatsoever containing' the drug (as opposed to the drug itsel), whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary, in addition to proof of the relevant minimum quantity specified.
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> [6] The word 'found" in s 37(d) must bear the same meaning as the word 'found' in s 37(da). Both require evidential materials in attaining proof thereof and are vastly different from the word 'deemed' employed in the said s 37(d). In the circumstances, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

[26] After perusing the relevant evidence on this issue, we found ourselves in

A complete agreement with the decision of the learned trial judge that there was more than sufficient evidence to establish that the appellant had exercised exclusive control and custody of exh P9 at the time of her arrest. Exhibit P9 was checked-in in the name of the appellant. The baggage tag and the baggage claim tag confirmed the fact. The appellant was also seen by SP2 opening B exh P9 by unlocking the padlock using a key taken from a purse (exh P11) which was inside a black sling bag (exh P10), carried by the appellant.

[27] Learned counsel for the appellant further submitted that the oral C evidence of the prosecution's witnesses regarding the existence of the padlock and the key (exhs P14A and P14B) ought to be rejected by the learned trial judge on the ground that there was contradiction with the documentary evidence tendered by the prosecution during the trial. Further, SP2, SP3 and SP5 are said not to be credible witnesses.

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[28] In cross-examination of SP2, SP3 and SP5, learned counsel for the appellant sought to challenge the fact that the appellant opened exh P9 by unlocking the padlock by suggestions that there are no records both in the police report and the *Borang Serah Menyerah Barang Kes* (exh P19) to support E the existence of the padlock. There was also no marking on the padlock and no photographs showing the padlock.

[29] We found no merit in the submission. SP2, SP3, and SP5 were unison F in their evidence that exh P9 was locked with padlock. SP2 said at p 15 of the appeal record ('AR'):

> Saya melihat OKT mengambil satu anak kunci dari dalam beg kecil yang ada di dalam beg hitam. Saya melihat OKT membuka beg tersebut. Kunci itu kunci mangga. Kunci diletak pada zip beg.

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[30] SP3, yet another eyewitness, testified at p 21 of AR:

> semasa suruh penumpang buka beg, ia berkunci. Mangga warna emas. Boleh cam P 14A dan B dicam. Tapi saya tak tanda sebab masa itu saya ada lagi satu maklumat. H Terlupa nak tanda ….

[31] Explanation had been given by SP3 why there was no marking on the padlock. SP3 said at p 24 of AR:

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> Kunci dan mangga tidak masuk dalam P19 sebab saya tidak menandakan.

Explanation had also been given by SP5 why he did not instruct SP4 to take photographs of the padlock. SP5 said at p 29 of AR:

> Dalam gambar P16 (1-25) tidak ada gambar kunci dan mangga. Tidak arah ambil gambar kerana setibanya di KLIA keadaan agak kucar kacir kerana pada malam yang sama kita mendapat 3 kes secara berturutan. Oleh yang demikian PKK Elangovan terlalu sibuk mungkin terlepas pandang.

SP3 also explained why he did not include the fact that the appellant opened exh P9 by unlocking the padlock in the police report. SP3 said at p 24 of AR:

> tidak masuk OKT buka beg dengan mangga dan anak kunci dalam D17 dan D18. Itu kelemahan saya. Amalan kita tidak sebut.

[32] We were satisfied with the explanations given by SP3 and SP5. Credence should be given to the narration of the incident by SP3 and SP5 who are presumed to have performed their duties in a regular manner, unless there is evidence to the contrary. Moreover, in the absence of proof of motive to falsely impute such a serious crime against the appellant, the evidence of SP3 and SP5 is to be accepted (see *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257; *Public Prosecutor v Teh Cheng Poh* [1980] 1 MLJ 251; *Public Prosecutor v Aedy bin Osman* [2010] 1 MLJ 810; [2009] 1 LNS 13 and *Public Prosecutor v Abdul Latif bin Sakimin* [2005] 6 MLJ 351).

[33] There was no doubt that exh P9 was locked by the padlock and it was the appellant who unlocked the padlock.

[34] We were in full agreement with the learned trial judge's findings that since the appellant had exclusive custody and control of exh P9, it was open to the prosecution to rely on the presumption of knowledge under s 37(d) of the DDA 1952. We did not find any appealable error in respect of this finding.

[35] In the circumstances of the case, even without relying on the presumption under s 37(d) of the DDA 1952, we were of the opinion that the prosecution had positively established the element of possession. The law on possession in Malaysia had been clearly set out by the Federal Court in the case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337. In delivering the judgment of the Federal Court, Arifin Zakaria FCJ (as His Lordship then was) agreed with the following speech by Lord Morris in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356:

> If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then ordinarily I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the

contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled of the nature of the contents, or if he had made wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[36] In *Public Prosecutor v Suzie Adrina bte Ahmad* [2006] 5 MLJ 135; [2006] 3 CLJ 889, Gopal Sri Ram JCA (as he then was) had this to say:

> Look at the facts here. First you have the actual physical possession by the respondent of the bag (exh P4(2)) in which the drug was found. Exhibit P4(2) was locked at the material time. She had the key to exh P4(2). Prima facie, therefore, nothing could be placed into exh P4(2) or taken out of it without her assent. This leads to the strong inference that she had mens rea possession of the drug. See, *Tan Ah Tee v Public Prosecutor* [1980] 1 MLJ 49.

Ground (b)

[37] Learned counsel for the appellant submitted that the learned trial judge misdirected herself when she took into account irrelevant and prejudicial facts when deciding that the appellant was guilty of trafficking. The learned trial judge said at p 93 of AR:

> In this case the Accused not only concealed, transported and carried the drugs, the following circumstances would justify the finding that the Accused was trafficking within the meaning of section 2 of the Act-
>
> (1) The large quantity of the drug surely cannot be for the personal use …;
>
> (2) The Accused had entered Malaysia earlier, ie on 25.12.2005 and stayed until 31.12.2009.

[38] It was vehemently argued by learned counsel for the appellant that his previous visit to Malaysia has no relevance to the instant case. In fact, in 2009, the appellant came to Malaysia with her mother's friend to get some gold as her mother was selling ladies accessories in Madina, Guinea.

[39] While we agreed that the learned trial judge may had taken into consideration the irrelevant evidence when deciding whether the appellant was guilty of trafficking, we were of the view that the learned trial judge had nevertheless addressed her mind on other relevant evidence, ie the drugs that were seized were found cleverly hidden at the bottom of the bag (exh P9); the appellant carried exh P9 all the way to Malaysia and the large quantity of drugs found in exh P9.

[40] Looking at the evidence as a whole, we were satisfied that there was sufficient evidence led by the prosecution to show that the accused had trafficked in the dangerous drugs. The evidence of the luggage tag and the boarding pass clearly showed that the appellant had boarded flight TG 417 from Bangkok to Kuala Lumpur. This evidence, coupled with the other evidence that exh P9 was checked-in in the name of the appellant and the drugs were found concealed underneath exh P9, proved that the accused was trafficking in the said dangerous drugs.

[41] 'Trafficking' is defined in s 2 of the DDA 1952, which, inter alia, include 'transporting'. The Privy Council case of *Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 provides a useful guidance as to the meaning of 'transport'. Lord Diplock in delivering the judgment of the board had this say:

> 'Transport', although it must involve possession of the drugs by the person who transports them, is the only member of the heptad of verbs that is not inconsistent with the retention of possession of the drugs by him after their transport. *It must mean moving the drugs from one place to another; it may mean moving them also to another person but it need not do so …*
>
> This, and the fact that it appears in the definition of the verb to 'traffic', of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combine to make it clear that *'transport' is not used in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drug to another.*
>
> Thus, *in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible …*
>
> *As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it.* (Emphasis added.)

[42] In the present case, the quantity of the methamphetamine transported by the appellant was much larger than is likely for her own consumption, and the manner it was concealed in the bottom of exh P9, an inference that the appellant transported them for the purpose of trafficking in the said drugs, would, in the absence of plausible explanation by her, be irresistible.

[43] In *Public Prosecutor v Ouseng Sama-Ee* [2008] 1 CLJ 337, after referring to the 'purposive approach' as explained in *Ong Ah Chuan*'s case, Gopal Sri Ram JCA said at p 343 that:

Now apply that approach here. The accused came from some other place to the house in question. He brought exh P18 along with him. The drug found in the bag exh P18 — almost 2kg of cannabis — was far in excess of what may be needed for personal consumption. In the absence of any explanation from the accused it is a fair inference the drug was obviously intended for some person, known or unknown to the accused. Or, to borrow the more elegant words of Lord Diplock in *Ong Ah Chuan*, it is a fair inference that the accused's purpose here was 'to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find'.

[44] In both *Ong Ah Chuang* and *Ouseng Sama-Ee*, the court drew an inference of trafficking from the fact that the accused was in the act of moving from one place to another conveying/carrying a quantity of drug much larger than needed for personal consumption although there was no definite or potential purchaser.

[45] In the instant case, the learned trial judge's decision that the element of trafficking had been proven was clearly correct.

CONCLUSION

[46] Having invoked the operative presumption of possession under s 37(d) of the DDA 1952, the learned trial judge did not make a ruling that the defence had not rebutted the presumption of possession on the balance of the probabilities following *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (PC). However, the evidence adduced by the prosecution is overwhelming and despite such a misdirection, we are satisfied that a reasonable tribunal would have convicted the appellant on the available evidence on a proper direction (*Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151; and *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381). In our judgment, the defence had fallen far short of rebutting the presumption of possession under s 37(d) of the DDA 1952 on the balance of probabilities. Indeed, the evidence showed conclusively that the appellant was trafficking in the dangerous drugs as per the charge and the defence too had not raised a reasonable doubt as to her guilt which the prosecution had established beyond reasonable doubt. It is safe to convict the appellant.

[47] In the result, we dismissed the appeal of the appellant. We affirmed the conviction and sentence forthwith.

Appeal dismissed.

Reported by Afiq Mohamad Noor